

Service Date: December 9, 1994

DEPARTMENT OF PUBLIC SERVICE REGULATION  
BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER Of the Application	)	TRANSPORTATION DIVISION
of Harry Ellis, dba Customized	)	
Services, Bozeman, Montana, for	)	DOCKET NO. T-94.6.PCN
a Class D Certificate of Public	)	
Convenience and Necessity.	)	ORDER NO. 6352

**FINAL ORDER**

**APPEARANCES**

**FOR THE APPLICANT:**

Jerome Anderson, Esq., P.O. Box 866, Helena, Montana 59601

**FOR THE PROTESTANTS:**

Larry Jent, Williams, Jent & Dockins, 506 East Babcock, Bozeman, Montana 59715, representing Three Rivers Disposal, Inc., and Waste Management Partners of Bozeman, Ltd.

William S. Dockins, Williams, Jent & Dockins, 506 East Babcock, Bozeman, Montana 59715, representing James W. Hassler and Cynthia A. Hassler, dba Recycle-It

**FOR THE COMMISSION:**

Denise Peterson, Staff Attorney, and Bonnie Lorang, Program Director, Transportation Division, 1701 Prospect Avenue, P.O. Box 202601, Helena, Montana 59620-2601

**BEFORE:**

DAVE FISHER, Commissioner & Hearing Examiner  
BOB ROWE, Vice Chairman  
NANCY MCCAFFREE, Commissioner

#### BACKGROUND

1. On January 20, 1994, Harry Ellis, dba Customized Services (Applicant or Ellis), filed an application with the Montana Public Service Commission (Commission) for a Class D Certificate of Public Convenience and Necessity to transport ashes, trash, waste, refuse, rubbish, garbage, organic and inorganic matters and recyclables between all points and places in Madison and Gallatin Counties, and to transport to certified landfills in other counties in Montana.

2. The Commission duly published notice of the application in the Bozeman Daily Chronicle, Bozeman, Montana and the Madisonian, Virginia City, Montana, and mailed the notice to all Montana intra-state motor carriers in the FEBRUARY MONTHLY NOTICE, 1994.

3. On February 14, 1994 the Commission received a protest of the application from Three Rivers Disposal, Inc., "doing business in conjunction with" and "d/b/a" Waste Management Partners of Bozeman, Ltd. (Waste Management Partners). This protest represented that Waste Management Partners holds Certificate of Public Convenience and Necessity No. 3835 which covers the area of the application.

4. On February 15, 1994 the Commission returned the protest because the Commission records did not show Three Rivers Disposal, Inc. dba Waste Management Partners of Bozeman, Ltd.

5. On February 17, 1994 the Commission received a second protest stating that Three Rivers Disposal, Inc., protested the application in the first paragraph, as in the prior protest. The

second paragraph represented that the protestant was Waste Management Partners of Bozeman, Ltd., which holds Certificate No. 3835 covering the area of the application.

6. The Commission also received protests from Disposals, Inc., holding Class D permit No. 3627 for the City of Dillon and a radius of 50 miles; James W. Hassler and Cynthia A. Hassler, dba Recycle-It, holding Class C Certificate No. 9162 between all points and places within Gallatin and Park Counties and from points in Gallatin and Park Counties to Yellowstone and Missoula Counties; EcoWest Corp., holding Class D Certificate No. 9238 including the City of West Yellowstone, and within a 25 miles radius; and Thomas F. Kenneally, holding Class C Certificate No. 1420, for the town of Whitehall and to or from points tributary, not exceeding 80 miles in any direction.

7. The Commission initially noticed the application for hearing to be held in Bozeman, Montana on April 14, 1994, and amended and noticed the hearing for April 13, 1994.

8. The Commission received a copy of Protestant's First Interrogatories, Requests for Production of Documents and Request for Admission to Harry Ellis, with a Motion to Shorten Time for Answering Discovery dated April 4, 1994. Applicant filed a response in opposition to the motion to shorten the time for answering discovery on April 8 and requested that the Commission schedule a hearing in Ennis, Montana. At a regularly scheduled business meeting on April 11, 1994, the Commission denied Protestant's motion to shorten the time for

answering discovery and granted Applicant's request to schedule a hearing in Ennis. The Commission allowed time to notice a separate hearing date for Ennis.

9. On April 7, 1994 Applicant filed a restrictive amendment to the application which would (1) prohibit service to or from points in Madison County lying within a radius of 50 miles of Dillon, Montana and (2) prohibit service within the city of West Yellowstone and a radius of 25 miles (both excepting landfills). Applicant anticipated that Protestants EcoWest Corp. and Disposals, Inc. would withdraw objections to the application.

10. The Commission conducted the Bozeman portion of the hearing scheduled and noticed for April 13 and 14, 1994 at the Holiday Inn, Bozeman, Montana. The Commission duly published notice of and conducted the portion of the public hearing in the Town Hall, Ennis, Montana on Wednesday, May 11, 1994.

11. Applicant obtained Commission approval of the restrictive amendments at the beginning of the hearing on April 13, 1994. Counsel represented that Disposal, Inc., and EcoWest had received copies of the amendment, were satisfied and therefore did not appear at the hearing.

12. Parties agreed to a simultaneous briefing which was amended several times at Applicant's request, because of the unavailability of the transcript and then counsel's schedule. Initial briefs were due August 26, 1994 and reply briefs due September 12, 1994. Protestant

Waste Management/Three Rivers did not file any brief; it filed Proposed Findings of Fact and Conclusions of Law on August 29, 1994.

#### SUMMARY OF TESTIMONY

Bozeman hearing, April 13 and 14, 1994

##### Public Witnesses

13. **Allen David Pruitt** is chair of the Gallatin County Commission, the Gallatin County Landfill Advisory Board for the Gallatin County Landfill and the Solid Waste Task Force for the Montana Association of Counties, and also a member of the Hebgen Basin Refuse District at West Yellowstone. Mr. Pruitt testified on behalf of the County and the Montana Association of Counties (MACO). The County adamantly opposes any entity controlling the majority of the PSC solid waste hauling permits in Gallatin County. Mr. Pruitt criticized the present system of permitting limited numbers of garbage haulers as rendering the competitive bidding process ineffective and creating a monopoly without rate regulation.

14. As a MACO representative, Mr. Pruitt stated that two companies control the majority of hauling permits in Montana, limiting competition and causing higher rates than if effective bidding were possible. Mr. Pruitt testified that the growth of Gallatin County since 1988 substantially exceeded the prior growth. Three Rivers or Waste Management had attempted to open a landfill to which Gallatin County Commission objected, believing that landfill service should be

provided by and under the control of local government. Mr. Pruitt supported competition in the abstract. His primary purpose in testifying is to get the citizens a reasonable rate for garbage hauling through meaningful competition.

15. **Carla Neasel** testified on neighborhood concerns. She lives near Mr. Ellis's terminal facility in Bozeman. The City of Bozeman has been lax in enforcing zoning requirements, she testified; she asked that the Commission consider impacts on the neighborhood of the additional truck traffic and garbage before granting any permit.

16. **Michael Derzay**, a resident of Gallatin County outside Bozeman, testified that he was dissatisfied with the service of Waste Management and would like to have an alternative company. The "weekly" service for six months has been spotty, averaging twice a month. His wife called to complain a number of times and was treated rudely. Despite the poor service, the price has increased.

17. **Gay Hovey**, also residing outside Bozeman, testified that problems with her current service are secondary to her desire for a choice in garbage service. She believed that competition would be good. The problems included billing discrepancies, not being billed, not having trash picked up, being required to have too large a container for a residence, and being unable to get a smaller container without a "real hassle." Her concern is service and not price.

18. **Harlan Olson**, Bozeman, owns and manages McChesney Industrial Park in Bozeman, seven to ten office complexes and light manufacturing

shops. Mr. Olson terminated the service of Waste Management and began hauling garbage, cutting costs. He believed that competition would help pricing. He does not want to continue hauling garbage, and would look at competitive service. He has used Mr. Ellis's service for demolition projects and would be interested in using the proposed service, finding Mr. Ellis reasonable.

19. **Pat Heinsleigh**, residing outside Bozeman, would like to see competition for a choice in garbage hauling. He believes that monopolies do not work. He takes care of his own garbage because he was dissatisfied with Three Rivers' pickup, service and prices. Three times Three Rivers forgot to pick up the garbage and charged for service not performed, without giving any credit. When called, the employee was rude to his wife.

#### Applicant's Witnesses

##### Bozeman

20. **Harry Ellis** (Applicant) appeared and testified. He has resided in Gallatin County, Montana for eight and one half years, in Bozeman for the past three years. He owns two businesses, Customized Services (six years), hauling garbage on government contracts and unregulated materials, and Number One Equipment Company (three years), buying and selling trucks, primarily garbage trucks. Customized Services has bid and provided contracted garbage service in Bozeman

and the surrounding area for state agencies and the federal government under PSC Certificate No. 9246GC.

21. Mr. Ellis furnishes garbage containers of different sizes as part of his service. He has a 25 cubic yard side load garbage truck with a pickup attachment, which automatically locks on to the container, takes it up and dumps it back in the original position. He disposes of the garbage at the Bozeman City Landfill. Besides the roll-off unit he has two garbage trucks; several other trucks; garbage bodies; pickups; 58 one to three cubic foot garbage dumpsters; one each 20, 30 and 40 cubic yard roll-off containers; one 20 foot roll-off flatbed; and numerous items of equipment on his equipment list exhibit. Mr. Ellis also can acquire more equipment as necessary and would hire more employees as business developed.

22. Mr. Ellis has provided the contracted service in Montana five days a week, for a total of seven to eight hours a week, as the driver, owner, operator and manager. Before coming to Montana, Mr. Ellis was in the garbage business for 14 years in Amarillo, Texas as a 30 percent corporate stockholder of Customized Services, Inc. The business had 12 rolling pickup units with 6 or 7 support vehicles and 25 employees, serving about 30,000 customers in Amarillo and 110 mile radius with \$1.2 million in annual revenues. From 1953 to 1960 Mr. Ellis had a small one truck operation in Denver, Colorado. Mr. Ellis testified that the Amarillo operation was considerably larger than the business he would have in Bozeman.



23. If he receives the authority, Mr. Ellis would change the operation. He would make more trips to the landfill and not store garbage overnight. He agreed that he would comply with all zoning requirements. He would advertise through the yellow pages and in the newspapers, and do personal solicitation. He would bill monthly, and provide the cans and dumpsters. He anticipates at least 1,000 residential customers and 250-300 commercial customers within 90 days of receiving authority.

24. Mr. Ellis sponsored an exhibit on his proposed rate schedule. Commercial service would vary from a one cubic yard container picked up once a week for \$27 per month to a four cubic yard container picked up three times per week for \$258 per month. Residential service would cost \$14 per month for once a week pickup. He testified that he based his price list on his experience in the business. He monitored the pricing structure and landfill cost state wide. Prices include the proposed cost of operations and a reasonable profit.

25. Mr. Ellis testified that his exhibit on the various cities in Montana and the garbage haulers was compiled from information he obtained and submitted to Mr. Pat Flaherty for analysis. He maintained that the exhibit showed that where there was competition the rates are better for the consumer. In Bozeman consumers pay a lot more than elsewhere in Montana. Mr. Ellis had applied twice before for authority in 1984 and 1987. He applied again because the area had grown and because people have repeatedly asked him to provide service.

26. Mr. Ellis testified that he would abide by all state and relevant laws. He discussed a PSC citation for having a container on West Lamme Street; a portion of the citation was dismissed because he was hauling exempt demolition material. He ceased hauling and paid \$25 court costs (no fine) for the portion of the citation which included a trade arrangement with a company outside Bozeman making hook/latch attachments for the garbage containers. He admitted to donating free garbage hauling service to Reach, Inc., a non-profit organization training developmentally disadvantaged.

27. Mr. Ellis testified that his equipment, although dated, has useful life remaining. His 1975 Diamond Rio truck and 1982 Ford trucks are each valued at \$15,000, with \$6,000 owing to First Security Bank in Bozeman. He has \$5,000 in roll-off containers (three containers and a twenty foot flatbed) and \$2,500 in 58 dumpsters. He did not list his bank accounts as assets, assuming that the application related to hard assets, buildings and land and equipment.

28. Mr. Ellis testified that he has some trailers he rents to Trades Guild Owners Association and Dana Design to place their garbage. They normally haul their own trailers, but sometimes he picks up the trailers and hauls them to the dump. For the trailer rent he charges \$80 per month. Management Associates hired Mr. Ellis to drive their truck (insured and licensed by them) and pick up their garbage at apartment house properties they own, on a contracted \$9 per apart-

ment unit basis. The Commission's enforcement officer was satisfied that the operation was legal, he testified.

29. Mr. Ellis is working with the city of Bozeman on conforming with zoning regulations. He is planting screening for his facility.

30. Mr. Ellis has the financial ability to handle the business. He would rely on bank credit and leasing. The 20 percent profit he forecasts includes his wages, overhead and office expenses, for a net profit of 8 or 9 percent. He would add personnel as needed.

31. **Patrick Flaherty** appeared and testified as an expert witness on behalf of the application. He has owned Northwest Transportation Consultants since 1978. As a transportation consultant, his expertise is in rates and tariffs and cost analysis. The firm assists with transportation expertise in filing papers, complaints and rate increases with regulatory bodies. He has been in the trucking industry since 1962 -- in cost analysis and statistics for the American Trucking Association, later for cost consulting firms in Washington, D. C., and finally in the State of Montana Office of the Consumer Counsel as a cost analyst in transportation. He studied accounting, economics and business law, and has testified in numerous regulatory proceedings in numerous states, including Montana.

32. Mr. Flaherty prepared exhibits and a verified statement. In "Abstract of Selected Items from Annual Reports," Mr. Flaherty listed the eight carriers primarily hauling under Class D authority, and abstracted data from their annual reports for the years 1988, 1991 and

1992. Mr. Flaherty determined total system expense and total system revenue, to arrive at system operating ratio. He also completed a study for the Montana Motor Carriers Association based on the annual reports of 286 intrastate regulated carriers for the year ended 1991.

Only 2.06 percent of the 286 carriers' total system expense was attributed to miscellaneous expenses, while Waste Management of Bozeman showed 50.06 percent attributed to miscellaneous expense in 1991, 52.65 percent in 1992. In comparing operating statistics of the American Trucking Association for 1990, the highest percent of miscellaneous expense to total system expense is 3.4 percent, and the average is 1.9 percent. He concluded that Waste Management Partners of Bozeman allocates far too much expense to miscellaneous expense.

33. Mr. Flaherty also testified on the operating ratio as the gauge used to determine the financial health of carriers. The industry standard before deregulation was about 93 percent (93 cents to cover expenses out of one dollar earned). The operating ratio for selected Class D carriers in the Montana Motor Carrier Association study ranged from 32.13 percent to 109.28 percent, with operating ratios less than 93 percent exceeding the norm.

34. Mr. Flaherty calculated average rate increases per year, based on Applicant's survey for 1987, 1988 and 1993. The rates for commercial garbage service from Waste Management in Bozeman are higher than those of other cities as shown on Exhibits PFF-3 and 4. Waste

Management would show a profit if it reduced the amount attributed to miscellaneous expense in 1991 and 1992 to the norm in the industry.

35. Mr. Flaherty admitted that Waste Management might have included workers' compensation premiums in miscellaneous expenses, but he had no way of knowing. He also admitted that other cities had shown steady increases in garbage rates since 1988. Of major Montana cities in Montana, only Butte has competition, he agreed. He responded that Waste Management's operating ratio of 109.28 percent is inordinately high, given its high rates, compared to low rates of others and their low operating ratios.

36. **Lavonne Flynn**, a Three Forks city council member, testified on the efforts of the Garbage Steering Committee to get into an interlocal agreement on a garbage truck to haul garbage. Waste Management/Three Rivers has been providing garbage service with the contract to expire May 30. Because Three Rivers was their only choice, the Committee tried to reach an interlocal agreement between Manhattan and Three Forks to control prices better and give the community better service. She supports the application because her community would like an alternative choice for service.

37. **Eleanor Mest**, Manhattan, Montana, a member of the Manhattan city council and garbage committee, testified that the community presently receives residential garbage service from Waste Management/Three Rivers. If the interlocal committee cannot agree, the only choice will be Waste Management/Three Rivers. She desires a choice,

believing that competition will keep prices down and result in better service. She also testified that the cities of Three Forks and Manhattan received a copy of a letter purporting to be from the Commission which represented that their attempt to handle their garbage hauling would be illegal. In fact, Three Rivers sent the letter copied out of context from another letter as though the Commission had sent the letter. Ms. Mest testified that this action is one reason they would like an alternative, in supporting the application.

38. **Mark Gilleland** resides in Bozeman and owns rental property outside Bozeman (double wide trailer). Waste Management provides the garbage service to the rental property. He has no complaint on the service; his complaint is the cost which has increased from \$25.20 per quarter to \$61.35 per quarter from 1991 to 1993.

39. **Phil Olson** resides two miles east of Manhattan and owns an auto and truck repair shop in Manhattan. He is on the local board pursuing the interlocal agreement to provide garbage service, and also on the Gallatin County Landfill and Airport Boards. The local board was formed because of the town's discontent "of being locked into a monopoly, of being forced to go to one carrier" with a bad attitude, he testified. The local board had discussed purchasing garbage hauling equipment from the Applicant. He testified that he would use the Applicant's service at his business if it were available.

40. **R. J. Reid**, Bozeman, manages the Farm Credit Services office in Bozeman. He has used the services of Three Rivers both at his

residence and the office, but its service has been unreliable. Although the office had paid for weekly pickup, the prior year it had not been receiving weekly service. The problem was corrected. Residential service was satisfactory, but both residential and commercial service had unreasonable rate hikes -- more than 80 percent increase from 1987 to 1993. He testified that he would use the Applicant's service if it were available.

41. **Craig Mandeville**, north of Bozeman, testified that competition would result in reasonable prices. He had no complaint about Three Rivers' service except for the price, which increased from \$11.60 per month in 1990 to \$20.45 to \$29.00 per month in November, 1993 (the last increase for the "backup service" he had always received).

42. **Eric Fendler**, from outside Manhattan, owns a plumbing and heating business in Manhattan with a warehouse and shop in Belgrade for which Three Rivers has provided service. In three "hellish" experiences, the Three Rivers' office was extremely rude on the telephone and argued that the garbage was picked up when it had not been. The driver told him a year ago that the people in the office used a derogatory term in referring to his wife, accusing her of swearing on the telephone, when he has never heard her swear in more than 15 years. A couple of weeks before the hearing, the office called him a liar and argued that the garbage was not out at 8:59 a.m., when in fact it had been out at 7:00 a.m. As a businessman, he

believed that competition would result in better service and encouraged approval of the application.

43. **Karen Brown**, Belgrade, testified that Three Rivers is not a public service oriented company. "They don't care. They would sooner call a customer a liar, and dispute with the customer...." When notified of missed garbage, the driver maligned her; the office said "We'll cancel you," and cancelled her without her request. In the past, Three Rivers double-billed a number of customers. When notified of the double-billing, they sent a cancellation notice to her elderly mother who lives in the country. Dealing with Three Rivers is stressful, she testified. Ms. Brown believed that this treatment would not happen if there were competition. She supported the application.

44. In supporting the application, **Cathy Haugland**, west of Belgrade, testified that her garbage service from Three Rivers has been inconsistent and sporadic, requiring nearly weekly calls. They cannot depend upon the pickup time, even when told a day and time. They have had to monitor and rebag garbage during windy days. The rates are high with no alternative, other than to haul themselves.

45. **Richard L. Miller**, northwest of Bozeman, testified that when his wife called Three Rivers to complain about the high garbage rates, she was told to make other arrangements if they did not want the service. There is no other hauler, so Mr. Miller and his neighbor have hauled their own garbage. He supports the application so that there will be competition. He would use the proposed service.



46. **James M. Davies**, rural Belgrade area, testified that he had previously had service from Three Rivers, but terminated it the previous summer, and now hauls his own garbage. He refuses to do business with Three Rivers because of repeated problems with pickup in June of 1992. He finally took the dumpster to Three Rivers office and paid for service he had not received to the collection agency. He hauls his garbage to the Logan landfill 30 miles out of his way. He would appreciate having another garbage hauler in the valley, supports the application and would use the services of Harry Ellis.

47. **Mark Frisby**, outside Bozeman, testified that in the two years he has lived here his rates have increased 76 percent while the amount of garbage he is allowed to deposit has decreased from three containers to one. He is required to pay for garbage service in advance, which he does not find a reasonable business practice. He would use Applicant's service.

48. **Clarence V. Stiefel**, Belgrade (Active Electronics, Bozeman), and Richard Vinton, Gallatin Gateway (MMC equipment repair, Belgrade), are two business people supporting the application for both commercial and residential service. Both Mr. Stiefel and Mr. Vinton haul their own garbage. Mr. Stiefel said that the rates increased while the service declined; the containers were too small for his boxes. Mr. Vinton would not use Three Rivers because of a business experience with them six or seven years before. Because there is no alternative to Three Rivers, private hauling is his only choice.

49. **Matthew Healey** and **Robert Boyce**, both residing outside Bozeman, testified in support of the application. Mr. Healey criticized the service as not being prompt, while expensive. Mr. Boyce stated that garbage has been left out on the ground after pickup, several times the dumpster was not dumped, and the dumpster was tipped over several times. Both would use Mr. Ellis's service.

50. **John Jetter**, outside Bozeman, testified that he presently hauls his garbage and would like Mr. Ellis to have the opportunity to offer garbage service.

51. **Bob Davies** (Management Associates), manager of about 100 units of rental property outside Bozeman, testified that he is responsible for hauling garbage for the units. For several years he has owned a garbage truck and contracted with Mr. Ellis to drive and pick up the garbage for the units. Before assuming the garbage hauling responsibility, he used the services of both the City and Three Rivers. He was dissatisfied with both the price and the service. When he called on missed pickups, Three Rivers had an arrogant attitude. He was billed for pickups that were not made. He purchased the garbage truck from Mr. Ellis, which he licenses and insures. He would consider using Mr. Ellis's service.

52. **Ted Hoff**, supervisor of the two McDonald's restaurants in Bozeman, testified in support of the application. He has used Three Rivers Disposal for about ten years. He testified that McDonald's has paid more for garbage service in Bozeman than elsewhere in the state

for many years. The on-call service is generally adequate. The prices were too high before, but have dramatically increased, despite compacting and recycling efforts. He supports a competitive service.

53. **Tom Jolly**, Big Sky, Gallatin County, testified in support of the application. Owner of the Half Moon Saloon, he receives service from Three Rivers. When he complained about being charged for four yard service for a three yard container, Three Rivers responded that someone put more garbage in the container or the container was overflowing. The service itself has been adequate. The bills have exceeded \$500 per month, but with recycling he has reduced the bill. He supports having an alternative service.

54. **Bonnie Zanck**, owner of a real estate business in Bozeman, testified in favor of competition and as a character witness for Mr. Ellis. She attested that he is a hard-working, service-oriented man of integrity. She did not have anything unfavorable to say about the Protestant, but she did know that others were afraid to come forward to challenge a garbage disposal company.

55. **Harvey Fisk**, Madison County, represents the Board of Directors for the Lake Condominiums at Big Sky. They have garbage collection from Three Rivers and have had a lot of problems with the service. Three Rivers has charged for service that the homeowners did not authorize. The homeowners have had difficulty getting the dumpsters fixed when the wheels fall off. At times Three Rivers picks up

garbage, at times not; at times Three Rivers empties bins, at times not. Three Rivers always charges, whether or not it provides service.

Protestant's Witnesses

56. **James Brinkman**, Bozeman, testified that he has been the certified public accountant (CPA) for Three Rivers Disposal since 1986. (The Commission took objections under advisement as to what entity holds the certificate and provides the service, as well as the motion to dismiss, and heard testimony from Mr. Brinkman.) In the early years the company showed modest losses, he testified, but showed a modest profit in the late 1980's and early 1990's. In the last couple of years, the company showed significant losses.

57. Mr. Brinkman testified that he lumped into miscellaneous expenses the following: (1) disposal costs of \$321,132 (costs paid to landfills); (2) \$24,808 (other hauling costs); (3) \$553 (uniform costs); (4) \$7,290 (selling expenses); (5) \$526,961 (total administrative expenses); (6) \$285,239 (JVCO contribution); (7) \$170,169 (landfill development); and (8) \$26,403 (interest). The total miscellaneous expense on the annual report totalled \$1,362,556. Administrative expenses include billing costs, travel, legal and accounting, other professional services, dues and subscriptions, collection expenses, telephone, and a 1992 theft employee theft of \$121,525.

58. Mr. Brinkman also testified that JVCO is a partnership of Three Rivers Disposal (87 percent) and Waste Management Partners of

Bozeman (13 percent); the JVCO contribution represents the 13 percent of revenue paid to Waste Management for services. Three Rivers expensed the landfill development fees in 1992 because the landfill was not approved. Sometimes the workers compensation expense is reflected in miscellaneous expenses, sometimes as insurance payments.

59. The gross revenues have increased from \$1.2 million in 1986 to \$2,368,000 in 1992, as shown on the annual reports to the Commission, Mr. Brinkman testified. Salaries totalled \$550,000 in 1992, versus \$225,000 in 1987. The company has spent \$1.5 million in new equipment and taken \$150,000 in depreciation in 1992. "This particular company, because of some other things that have happened, operates on a very thin margin," he testified. He believed that the loss of 1,000 customers would have a very significant impact on the overall financial stability of the company.

60. Mr. Brinkman admitted that he prepares the annual reports for the Commission of Waste Management Partners of Bozeman, Ltd., but is paid by Three Rivers Disposal. Mr. Jerry Arbin is a sole owner of Three Rivers Disposal, which was a partnership before it was incorporated on April 1, 1993. Mr. Brinkman denied knowledge of two documents filed with the Commission on February 13, 1991, stamped with a representation of his accounting firm logo, which show assets, liabilities and capital. He admitted that the miscellaneous expenses could have been categorized better in the annual report. He had no idea who comprised Waste Management Company of Colorado. He did not know what

13.6 percent of revenues Waste Management Company was entitled to. He was not sure what services Joint Ventures (JVCO) provided to Waste Management Partners of Bozeman for \$285,235, but assumed it was for billing services. The expense for landfill development was incurred over two years, and expensed in 1992, he testified. On the theft account, checks were written totalling \$121,525 for services not provided. The loss to the Three Rivers account appears as a cost item in the income statement of Waste Management Partners because it is a partnership account, he testified.

61. Mr. Brinkman admitted that the figures for hauling costs could appear under items for purchased transportation or operating supplies and expenses. Mr. Brinkman denied that he intended to mislead by categorizing the expenses as miscellaneous. He volunteered that he should have attached a schedule. Mr. Brinkman testified that Mr. Arbin or Three Rivers has not taken money out of Waste Management or Three Rivers. He admitted that one could be in the garbage business without owning a landfill.

62. **James Wilbur**, Department of Health and Environmental Sciences, Solid Waste Management Program, is in charge of licensing for all solid waste management facilities in Montana. He testified generally on the landfills and in Gallatin, Beaverhead and Madison Counties, and on implementation of Subtitle D by the EPA, the solid waste management rules with delayed effective dates of April, 1994. Although not an

expert on landfill costs, he testified that some landfills have doubled charges, while some have only increased small percentages.

63. **Brian Frink**, Executive Officer of Waste Management Partners of Bozeman, Ltd., since 1991, oversees operations and handles administrative matters as second in command to the owner, Mr. Arbin. From secondhand knowledge of company documents, Mr. Frink testified that there was a contract in which Waste Management, Inc. provided capital to purchase the operating authority and customer list in Gallatin valley. Three partners, including Mr. Arbin, obtained the equipment and operated as Waste Management Partners of Bozeman under the Waste Management partners program which formerly loaned money for garbage hauling companies. For the term of the contract, partners agreed to pay a fee for the capital of 13.6 percent of "moneys generated by this garbage company."

64. Mr. Frink testified that the company has 28 employees in Bozeman in administration (billing, complaints, office support), operations (drivers), repair (trucks), and maintenance (containers). The company has about 5,925 residential accounts and 861 commercial accounts. He believed that the City of Bozeman has about 3,973 residential and 250 commercial customers. He stated that the company had lost customers to the City of Bozeman and that business has increased over the past three years, but stayed relatively the same. He testified generally that losing density (number of customers) on an established route is hard. Many costs remain fixed, although there

might be some savings in less landfill cost and fewer stops. The company has "gone to an automated residential system of three types of tote carts." The carts are on rollers and the truck automatically lifts the 32, 64 or 96 gallon carts. Automation has reduced the substantial workers' compensation injury claims.

65. Mr. Frink testified about the equipment, facilities and service of his company. The company provides varied residential and commercial service. It also has a thousand sets of recycle containers in storage for curbside recycling, as well. In addition to the truck shop with full time mechanics, the company has a full-time container repair and maintenance shop. The equipment is generally new and technologically advanced, and primarily leased. Although a market value was placed on the equipment, most of it was not part of the assets of the company. Mr. Frink did not know which equipment was leased or financed and had not had a market appraisal of the assets. The rates are determined by cost of landfill fees, distance traveled, truck size, general cost of operation, density, and level of service, he testified. Most of the commercial customers are in the rural areas.

66. Mr. Frink believed that granting the requested authority would have a detrimental effect on "Three Rivers or Waste Management Partners, Limited of Bozeman." He stated that the company has proposed and made a management decision to upgrade services with modern



equipment and a good maintenance shop. Not having the funds to purchase, they have leased the equipment.

67. Under cross-examination, Mr. Frink testified that he devotes 40 percent of his time to the disposal company in Montana and 60 percent in California to OLS, Incorporated, with responsibility for four companies which do not provide disposal service. Mr. Frink admitted that somebody (he knew not who) had directed Mr. Simonson, an employee of his company, to put Mr. Ellis under surveillance to obtain information for cross-examination.

68. He further testified that Joint Venture Company (JVCO) is paid a fee for the provision of capital to Waste Management Partners of Bozeman, Ltd. The fee is 13.6 percent of the revenues, regardless of the total amount of the revenues, which goes to Waste Management corporate. On examination from Recycle-It, Mr. Frink indicated that his company was prepared to do curbside recycling but that it had not had a high demand for the service. He did not believe that there was an additional need for providers of recycling service.

69. Under cross-examination, Mr. Frink testified that Mr. Kountz, Assistant Manager for Three Rivers Disposal, did not have authorization to send the letter to Three Forks and Manhattan on the Commission's letterhead which misrepresented the Commission on joint garbage hauling. A letter of reprimand is in Mr. Kountz's file.

70. **Harry Simonson**, operations manager for Three Rivers Disposal, has worked in the garbage business since the 1970s. He testified

that there was a period of upheaval in the garbage business when there was competition. He was in and out of the business a number of times when he went to work for Three Rivers Disposal on April Fools Day, 1984. He testified that the new automated system has cut down on employee injuries. The new equipment is more reliable than that used in 1991. Mr. Simonson also testified on the long rural routes in the service territory with few customers.

71. Billing complaints are handled by the secretary, Mr. Simonson stated, while he and Mr. Kountz handle more major upsets. They do not keep a complaint file, except if a "person is a problem," in which case they note that on the route sheet. On recycling, Mr. Simonson stated that they offer the service and pick up about 150 homes every other week. Mr. Simonson admitted that he conducted surveillance of Mr. Ellis's garbage hauling activities.

72. **Charles Ferguson** owns a four-plex in Bozeman. He testified in support of Three Rivers at their request. He chose Three Rivers for service because he did not like the city's tag system which he found inconvenient and expensive. He noted that "Waste Management" is on the door of Three Rivers Disposal. He has rental property in Great Falls and Waste Management there has provided good service. He is satisfied with the courtesy and billing of Three Rivers.

73. **Joe Arneson** and **Terry Seavey**, Belgrade, testified that they use the service of Three Rivers and have been satisfied, particularly with the toters. **Blair McGavin**, Bozeman, Albertson's store director,

has intermittent on-call service at 24 hours notice which has been very satisfactory. The stores have 40 yard compactors which are very heavy. He would consider a competitive service at lower rates, but service is very important. **Jerry Ritter**, Bozeman, owns Corner Club Bar and Restaurant at Four Corners. He has had no complaints on Three Rivers service for a four yard dumpster, twice a week for 16 years.

Ennis hearing, May 11, 1994

Applicant's witnesses

74. At Ennis, Applicant presented the testimony of the following witnesses in support of the application: **Richard Barr; Peggy Todd; Vicki Lubke; Jackie Shirley; Phyllis Bowles; Bill Kidd; Corrine Cummings; Patsy Long; Stephanie Vuyovich; Ron Lake; Art Subczak; John Overstreet; and Larry Larsen.**

75. **Mr. Barr**, mayor of Ennis, testified on the history of garbage service in Ennis. Before September, 1987, the town had a mandatory garbage service agreement with Three Rivers Disposal. In the new contract, the city dropped the mandatory requirement at the urging of the citizens. In 1992, Three Rivers approached the city council saying there would be a possible 400 percent increase in garbage rates. Three Rivers proposed that the city pay the county landfill prices and go directly with Three Rivers. Mr. Jent, city attorney, in March, 1993 presented the city with proposed rates and mandatory garbage service which the city again opposed. In May, 1993,

Three Rivers again approached the city, proposing mandatory rates of \$15 per month, or alternatively an open rate of \$23 per month (up from \$6). Mr. Jent was also representing Three Rivers. The city published notice disassociating from Three Rivers and leaving it to the individuals to negotiate individually. In August, 1993 there was a huge increase in the new rates, and people were told that it was because there was no mandatory contract.

76. Mr. Barr owns a motel. His rates increased from \$40 to \$121 per month for the same service in August 1993. Although he does not have the time and it is inconvenient, he hauls his garbage to the transfer site. He supports a competitive alternative. The service from Three Rivers in the past had been sporadic with a lot of breakdowns, with numerous calls to Mr. Fagliano, but by the last year it was satisfactory. It was a problem that Three Rivers would come at 5:30 a.m., bang the compactor for 15 minutes, bothering motel guests.

77. **Peggy Todd**, Ennis resident for 46 years, found Three Rivers service had become unaffordable and sporadic. She supported the application.

78. A number of business people in Ennis supported Mr. Ellis's application. **Vickie Lubke**, owner of a gift shop and children's clothing store and rental apartments in Ennis, hauls her own garbage to the transfer station, as do her tenants. She had used Three Rivers service until notified that the rates were raised from \$27 to \$78 per month. Without the transfer station, she would have no alternative.

**Jackie Shirley**, owner of a four-plex in Ennis, uses Three Rivers service. On changing from W. M. Partnership to Three Rivers, they took away her commercial dumpster (\$27 for three months) without notice and replaced it with a dumpster one-fourth the size for \$55 per month. They would not pick up garbage that fell off the dumpster, even if it was their fault. She has no choice without an alternative service. **Phyllis Bowles**, owner of Ennis Trading Post, found that the rates had become higher for much reduced service. She was informed that she had been sharing a dumpster with a business that had moved, and she would have to pay \$70 per month. Mr. Ellis had shown her that her rates would be about \$25 per month. **Corrine Cummings**, retail manager for the family owned Ennis Pharmacy, presently hauls their garbage. They had used W.M. Partners (Waste Management) but had messy service, rude treatment, and quadrupled bills. Mr. Ellis convinced them that he could provide affordable quality service. These witnesses support Mr. Ellis's application.

79. **Bill Kidd**, in the real estate and rental business in Ennis, has had rates go from \$27.50 to \$73.00 per month for a two-yard dumpster for apartment units. He had a service complaint on a log duplex; they repeatedly failed to empty a third can, despite numerous calls. He supports the application. **Patsy Long**, owner of Camper Corner RV park, supported the application. She now hauls the garbage since they decided to raise her bill from \$19 to \$175 per month, although she did not even have a dumpster. Whenever she called the

office, she was treated rudely. They entered into an agreement to pay \$25 per month year round, though there is no business in the winter. Again, her rates were raised to \$145 per month; and in the summer, without notice, she received a bill for \$245.

80. **Stephanie Vuyovich**, owner of a motel, restaurant and bar in Ennis, started hauling the business's garbage three years before, because of dissatisfaction with the service of Three Rivers. The garbage truck would leave the dumpster anywhere, strewing trash in the driveway. They also left a dumpster with a dead animal all winter. When called, the office responded rudely. She also had a complaint on residential service. In her subdivision she prepaid for a quarter of garbage service. Three Rivers said it could not drive down her driveway; it discontinued service, and failed to give a refund. She supports an alternative service.

81. **Ron Lake**, owner of an art gallery in Ennis, has hauled his own garbage since Three Rivers raised his rates from about \$30 to \$130 per month without advance notice. He supported the application. **Art Subczak**, opening a restaurant in Ennis, supported the application. Only Mr. Ellis had solicited his business.

82. **John Overstreet**, Superintendent of School District 52, Ennis, testified that the school district uses Three Rivers service. The district switched to once a week pickup. The school budget, formalized in August, would not cover the rates of twice a week service which increased from \$216.00 to \$459.99 per month without

notice in September. The once per week pickup costing \$323.38 monthly was not adequate so they added one dumpster for a total of \$373.38 monthly. However, the budget is short now by \$1,000; the only alternative now is to haul it themselves. Mr. Ellis has indicated that if he gets the authority the garbage service would cost \$260 to \$270 per month. The district would prefer not to haul its own garbage.

83. **Larry Larsen**, owner of Economy IGA Market, Ennis, used Three Rivers service until September, 1993. In January, 1993, he did the budget, understanding that rates would increase two and one-half times the \$112.50 per month. In August he received a bill for \$900 per month for twice weekly pick up. He terminated service. Sometimes Three Rivers' equipment broke down and garbage piled at the door. When they did pick up the garbage, they treated containers roughly and left garbage behind.

Protestant's witnesses

84. **Donna Owens**, secretary at First Madison Valley Bank, testified that Three Rivers provides the bank adequate service. **Bob McDonald** has had service from Three Rivers since 1982 and is satisfied. However, he would consider a competitive garbage service, if he had a price comparison.

85. **Bill Jeffry**, Vice President and General Counsel of Waste Management, Inc., Mountain Group, is responsible for legal matters in seven states and the northwestern provinces of Canada. In Montana,

the Group has Waste Management of Montana, all the hauling companies under their direct control, and Waste Management Disposal Services of Montana, which owns the landfill in Great Falls. Mr. Jeffry testified that Waste Management Partners and Waste Management Three River Disposal, Inc., Partnership officially terminated in 1994, but extended the term. They were attempting to work out a buy-out in which they would transfer the ownership of the joint venture company to Three Rivers Disposal, Inc., as set forth in documents dated 1984.

86. According to Mr. Jeffry, Waste Management Partners of Bozeman, holder of the certificate, consists of two limited partners, Three Rivers Disposal, Inc., and Waste Management Partners, Inc., and a general partner, also Waste Management Partners, Inc., a subsidiary of Waste Management Technology, Inc. Waste Management Partners of Bozeman hired Three Rivers Disposal to pick up the garbage. The partnership owns no vehicles. Mr. Jeffry described a complex arrangement of profit sharing between the general partner and Three Rivers Disposal and Waste Management Partners, Inc. The general partner also entered into an agreement in 1984 with Three Rivers Disposal (not the partnership) to provide a number of services, including maintenance review, financial help, loans for partners, setting up company, bonding, insurance, computerized system for billing and reporting financial information, and equipment leasing. Mr. Jeffry maintained that the larger company's purchasing power resulted in lower cost of equipment and rates of interest. He testified that these services,



including his legal counsel, were all available. Yet, he had not done work in Bozeman. The set fee of 13.6 percent of revenues, however, was not payment for these services. In his opinion, it was legal for Waste Management Partners, Inc., to contract with its own partner. He was unable to quantify any benefits received by the disposal company for the payment to Waste Management, Inc., in Colorado. He was unfamiliar with the employees or operations of Three Rivers Disposal or Waste Management Partners. He testified that Waste Management did not have to do anything to earn the return on its investment.

87. Mr. Jeffry testified that granting Mr. Ellis the requested authority would have little effect on the buyout. He stated that there was no formal lease of operating authority from Waste Management Partners to Three Rivers Disposal. He recognized that Waste Management Partners of Bozeman had not applied for approval of a lease nor of the business name Three Rivers Disposal Company.

88. **Jerrold Arbini**, owner of Three Rivers Disposal, testified on his college degrees, exemplary military history, various occupations and companies he owns in addition to the garbage service in Bozeman. In the early 1980s he and a partner became involved in the Waste Management Partners program.

89. Mr. Arbini testified on studies on pricing and garbage related to service and rates, as developed through the Simm System, the multi-million dollar system provided by Waste Management (with a lot of whistles and bells he does not need). The study arrived at an

average cost per month of \$13.77 per residence, which includes the contract customers. He maintained that the residential rate is 45 cents cheaper than the residential rate proposed by the Applicant. Three Rivers has the highest rates because it has the highest landfill rate, responded Mr. Arbin about the landfill rates as a component of the cost of service. Taking the landfill fees off the top, he maintained that Three Rivers is competitive with the four other major municipals.

90 Mr. Arbin testified on steps he has taken as a manager to become more efficient and competitive, such as offering larger bins to be picked up less frequently. Mr. Arbin has in place a system in which he can know at a moment's notice how much is budgeted, spent, and made overall and in various areas. He said that half a million dollars per year was going into maintenance before he took over. He is taking that money and instead placing it in new, more dependable automated equipment, saving labor and maintenance.

91 Mr. Arbin testified on complaint matters. He said that the customer is always right. Yet, he has his employees keep a route sheet, call in on it periodically, and turn it in at the end of the day with cracked cans, customer complaints (97 percent of which are "missed cans") and so forth. If the customer calls and says the garbage was missed, they pull out the route sheet and tell the customer he was wrong. The drivers will make efforts to knock on the door and pick up the garbage. The drivers are given special instructions

to note a "chronic," someone who does not put out the garbage can, and then they send Harry, the operations department head, out to talk to the people. The drivers are also instructed to leave notes, or tags, on cans explaining why they were not picked up (e.g., too much garbage or a can full of water) and requesting them to call the office.

Although Mr. Arbinì did not dispute that any of the witnesses supporting the application were telling the truth, he testified that various of his business records indicated doubt in his mind.

92 Mr. Arbinì testified that the loss of 1,000 residential customers would amount to the loss of about \$130,000 per month. If Mr. Ellis served the number of commercial customers he projects, Mr. Arbinì testified that he would lose one-third of his commercial revenue, a "devastating" effect. To staff questioning, he testified that the landfill development costs are not recoverable from disposal expense until the money invested in the landfill becomes a savings to the company. If he gets the embezzling cost back, that will be profit.

93 Mr. Arbinì testified on proffered exhibits related to the initial partnership agreements in 1984. The total infusion was about \$685,000. The partnership pays Waste Management 13.6 percent of its generated revenues to cover the initial contribution and services. Now, there is negotiating for a buy-back of the customer accounts. The partner companies of Waste Management are down from 150 companies to about 6 or 7. As one part of the organization, the partners are in

competition with Waste Management, Inc., another part. He admitted that it was convoluted, but as long as the partner company gives Waste Management the 13.6 percent to repay them the up-front money, he can operate the company the way he wants to. If he wants to buy the company back, there is a formula which includes the software and maintenance programs. He did not know what portion of the 13.6 percent was allotted to pay back the initial amount.

94      **Harry Simenson** was recalled to testify about customers who testified at the hearing in Bozeman. He disputed one witness who testified that the weekly service was unreliable and not picked up weekly by stating that Three Rivers does not have every other weekly service. The witness had complained that the lids on the containers were not being fixed, but Mr. Simenson looked at the printout sheet and said that they did fix it. Mr. Simenson maintained that another witness was wrong to say that he was not picked up, because the driver said she did and it was on the route sheet. He referred to problem customers as "chronic screamers" and has the driver call when she gets to those stops. He keeps complete printout records on all problem customers who have complained. They stopped service to one woman in Belgrade who was angry enough to tell a driver that she was going to whip him and called the office, using profane language.

95      **Rick Hanson**, in-house environmental engineer for Three Rivers Disposal, compiles information on landfills. He testified that landfill costs have increased as a result of Subtitle D and compliance

requirements. He stated that "we ... are trying to get our own landfill," believing that it could be run more efficiently, with the goal of keeping landfill costs low.

Protestant Recycle-It

96     **Jim Hassler**, Bozeman, is an owner of Recycle-It, a curbside service and free public drop off for recyclable materials. Recycle-It holds a Class C certificate. It picks up residential cans once a month and businesses on an as-needed basis. The residential fee is \$6 per month and business fee is \$6 per pickup. Recycle-It has available a list of items it is able to accept; the list increases every year. He testified that the garbage trucks Mr. Ellis proposed to use for curbside recycling service would not be efficient or useful for the proposed service, as they are costly to run and do not have areas to separate the recycling. Recycle-It takes the recyclables to its facility, a recycling center. Mr. Ellis would not have a recycling facility. Recycle-It's facility has balers, crushers, a forklift and other equipment to process the recyclables. Recycle-It could handle twice the accounts it presently has, Mr. Hassler testified. The business has not been profitable, and would suffer from additional competition, particularly cream-skimming of the more profitable business accounts.

FINDINGS AND DISCUSSION

97 Pursuant to Title 69, Chapter 12, Montana Code Annotated (MCA), the Commission supervises and regulates intrastate motor carrier service. § 69-12-201, MCA. The maintenance of an adequate common carrier motor transportation system has been declared a public purpose. § 69-12-202, MCA. To obtain motor carrier operating authority, a motor carrier must file an application with the Commission, which will give notice of the filing and schedule a hearing upon filing of a protest or a request for a hearing. § 69-12-321, MCA.

98 Section 69-12-323, MCA, sets out the requirements for a Commission decision on an application for a certificate and the evidence presented at hearing. The Commission shall find and determine from the evidence whether public convenience and necessity require authorizing the proposed service. The Commission will consider existing transportation service; the likelihood of the proposed service being permanent and continuous 12 months of the year; and the effect of the proposed service on other essential transportation service in the affected communities. Under § 69-12-323(2)(b), MCA, for purposes of Class D certificates, a determination of public convenience and necessity may also include a consideration of competition.

99 The Commission has interpreted § 69-12-323, MCA, as requiring it to address these issues before granting an application for authority:

- a. Is the applicant fit and able to perform the proposed service?
- b. Does the public convenience and necessity require the authorization of the proposed service?
- c. Can and will existing carriers meet the public need for the proposed service?
- d. Would the proposed service have an adverse impact on existing transportation service?
- e. **(discretionary for Class D applications, only)** If there is a public need for the service and applicant is fit to provide the service (even if existing carriers could meet the need or might be harmed by granting the application) would competition with the existing carriers promote the public interest?

**Fitness**

100 The Commission makes a threshold determination of whether the applicant is fit, willing and able to provide the service, considering these factors: (1) the financial condition of the applicant; (2) the intention of the applicant to perform the service sought; (3) the adequacy of the equipment the applicant has to perform the service; (4) the experience of the applicant in conducting the service sought; and (5) the nature of previous operations, if there are allegations of illegal operations.

101 The Commission finds that Applicant has demonstrated that he is fit, willing and able to provide the service for which he has applied. Financial records indicate that Applicant has the capability to operate and maintain his present equipment and to acquire new equipment as needed, through his garbage equipment leasing operation.

He has operated as a garbage hauler under Class C contract authority and has additional time and labor available to put his present equipment to use. When the business increases, he can hire additional help to operate his present equipment and acquire additional equipment. There was no evidence that Applicant's equipment required a full-time mechanic, was in any disrepair, or failed to meet its scheduled contract rounds. Maintaining equipment does not require an expensive facility or a mechanic on full-time duty, which may raise the cost of providing service. Neither do rate-paying customers require garbage pickup on the newest and most technologically advanced equipment.

102 The Commission finds that Applicant intends to perform the service twelve months a year. He has many years of experience in performing garbage hauling service in this state (on a contract basis) and in Texas previously. Protestant raised some scant allegations of illegal activity. Apparently, Applicant received citations for hauling without authority, which were reduced upon his appearance in court. According to his testimony, some of the hauling was exempt demolition work. The alleged charges do not rise to the level of persistent illegal activity sufficient to engage in analysis on



whether the activities impinge on fitness. Applicant has met the threshold requirement to demonstrate fitness.

### **Public Need and Convenience**

103 In determining public convenience and necessity, the Commission has traditionally followed the analysis of Pan-American Bus Lines Operation, 1 M.C.C. 190 (1936).

The question in substance is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines of carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest. 1 M.C.C. 203.

### **Competition and Public Convenience and Necessity**

104 The public need to meet in an application for a certificate of public convenience and necessity is shipper need. In a Class D application, this need is for garbage hauling service. It is a given that there is a public need to have garbage hauled. Three Rivers/Waste Management has the authority to provide garbage hauling service in the area of the application. Many witnesses attested to the need for additional authority in the area; many have been forced to haul garbage themselves by inconsiderate service and large rate increases.

Based on the testimony at both hearings, the Commission finds that there is substantial unmet shipper need supported by shipper testimony. Three Rivers has created a niche for competition with its atti-

tude toward customers and service and its take-it-or-leave-it approach to rates and service. Therefore, a determination of public convenience and necessity requires the Commission to consider competition.

Existing carrier's ability to meet public need; resulting harm

105 When the issue of competition is raised, the Commission does not view it as a stand-alone, controlling element, but rather in the context of the basic principles of motor carrier regulation. Upon determining fitness of an applicant and public need for the service, the Commission examines the ability of existing carriers to meet the need. There is no doubt that Protestant has the authority, facilities, equipment and financial wherewithal to perform this service. The public, however, has resoundingly demonstrated that Protestant has provided rude and intimidating service, terminated service, and informed customers that they have no option other than to take the service or haul it themselves. Mr. Ellis recognized a need for competition and applied for this authority, stepping in to fill this niche and provide an alternative service that most of the witnesses would not otherwise have.

106 It takes a lot of courage for members of the public to come forward and testify at a garbage hauling hearing. Those presiding at the hearing judge the credibility of witnesses. Protestant's witnesses corroborated the public testimony. While giving lip service to the maxim that the customer is always right, the customer in fact is never

right to the employees and management of Three Rivers/Waste Management. They keep lists of "chronics," send out "Harry" to talk to these chronics when necessary, tell the customers they are wrong (and if they do not like it, they can haul it themselves), and allow the office staff to persist in rudeness to customers. Even in the face of the evidence at the hearing, the company position was steadfast that the chronic problems alone came forward, and of course these witnesses were wrong. The Commission finds that competition would promote the public interest in improving garbage service to this area.

107 There is also evidence that rates for many of the services offered are not affordable, which is one factor to consider in evaluating competition. Increased rates when conjoined with service problems do indicate that competition would be beneficial. Witnesses testified that the amount of the garbage picked up had declined, while the rates increased. They were forced to go to smaller quantities and less frequent pickup, but paid higher rates. Granting the application on the basis of competition should promote the public interest in encouraging reasonable cost-based rates for considerate service.

108 The operating statement and financial reports indicated that the disposal company was flush with equipment, facilities, staff, and available expensive computer power with unnecessary bells and whistles. The financial support of Waste Management, Inc., had been available at least until the buyout was negotiated, at a cost of 13.6 percent of the gross revenues for the previous ten years. This

payment included only a small, but unknown, repayment of the initial \$685,000 loans. The reports included embezzling costs and landfill development costs that are not the responsibility of the rate-paying customers. The Commission finds that with all its resources Protestant should not be harmed by the grant of this application on the basis of public convenience and necessity.

109 The Commission in Docket No. T-9590, Order No. 6326, ¶ 90, determined that competition would permit a grant of authority even though an existing carrier might be able to fill the need or would be harmed by the grant of additional authority, if the overall outcome of the grant would promote the public interest in the motor carrier context. Here, Protestant might be capable of filling the need, but it has demonstrated that it would do so in a rude and intimidating fashion without competition. Of course, Protestant cannot fill the need for an alternative, when it tells customers to take it or leave it. There is no credible evidence that Protestant would be harmed if Applicant is granted the authority it seeks.

110 The Commission has weighed competition as allowed in consideration of applications for Class D garbage hauling authority. The Commission finds that public convenience and necessity require the proposed service, that Applicant is fit to perform the service, that the existing carrier may be able to perform the service, but will not be harmed by the grant of the application, and that competition will promote the public interest in improving service, and perhaps rates.

111 Because of an act of Congress after the hearing on this matter, which will become effective January 1, 1995, the Commission will no longer have authority over Class C recyclable hauling. Therefore, the Commission cannot directly address the concerns of Recycle-It on destructive competition from any of Applicant's recycling efforts, which he may also perform under Class D authority. The Commission notes, however, that recycling likely will be a very limited part of Applicant's operations, given its equipment and intent to provide garbage hauling service. Recycle-It no doubt will encounter competition from other sources than Applicant, but it appears to have an advantage in recycling in the area, with a facility in place.

#### CONCLUSIONS OF LAW

1 The Montana Public Service Commission properly exercises jurisdiction over the parties and matters in this proceeding pursuant to Title 69, Chapter 12, Montana Code Annotated.

2 The Commission has provided adequate notice and opportunity to be heard to all interested parties in this matter pursuant to the Montana Administrative Procedures Act (MAPA) requirements for contested case procedures. §§ 2-4-601 et seq., MCA.

3 An applicant for a certificate of Class D operating authority must show that the public convenience and necessity require the proposed service. In applications for Class D garbage hauling author-

ity, the Commission may consider competition as a factor in determining public convenience and necessity. § 69-12-323, MCA.

4 Applicant is fit to provide the service as requested.

5 Applicant has demonstrated a public demand or need for a the proposed service which is not met by existing carriers and cannot be met so long as the Protestant has no competition.

6 Granting this application will not adversely affect Protestant, or be destructive to an extent contrary to the public interest, but will likely encourage reasonable, cost-based rates and considerate service.

#### ORDER

NOW THEREFORE IT IS ORDERED that the application of Harry Ellis, dba Customized Service, Bozeman, Montana for a Class D Certificate of Public Convenience and Necessity is granted as follows.

Class D - Ashes, trash, waste, refuse, rubbish, garbage, organic and inorganic matters and recyclables between all points and places within Madison and Gallatin Counties. Carrier may transport commodities to certified landfills from territory authorized.

Limitations: (1) Service is prohibited to or from any points within an area in Madison County that lies within a radius of 50 miles of Dillon, Montana except that service from points outside that area to certified landfills within that area is permitted.

(2) Service is prohibited within the city of West Yellowstone, Montana, and to or from points within a radius of 25 miles thereof, except that service from points outside that area to certi-

fied landfills within that area is permitted.

IT IS FURTHER ORDERED that the Applicant must, within thirty (30) days of the mailing of the notice of the rights herein granted comply with all rules and regulations of the Montana Public Service Commission.

DONE AND DATED this 21st day of November, 1994, by a vote of 3-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

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BOB ROWE, Vice Chairman

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DAVE FISHER, Commissioner

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NANCY MCCAFFREE, Commissioner

ATTEST:

Kathlene M. Anderson  
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.